

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

UMG RECORDINGS, INC., ET AL,  
Plaintiffs,

vs.

GRANDE COMMUNICATIONS  
NETWORKS, LLC, ET AL,  
Defendants.

:  
:  
: Case Number:  
: 1:17-CV-00365-DAE  
: Austin, Texas

:  
: January 5, 2022  
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TRANSCRIPT OF PRETRIAL CONFERENCE  
BEFORE THE HONORABLE DAVID A. EZRA  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (Wednesday, January 5, 2022, 9:05 a.m.)

2 \* \* \*

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: All right. Good morning to all of you and  
5 I thank you for making yourselves available this morning.

6 COURTROOM DEPUTY CLERK: Good morning, Judge. Court  
7 calls AU:17-CV-365, UMG Recordings, Inc., et al versus Grande  
8 Communications for a pretrial conference.

9 THE COURT: Now, what we're going to do is ask for  
10 counsel to put themselves on the record and we'll start with  
11 the plaintiffs and then any lawyers that are on the call can  
12 also identify themselves.

13 MS. AMSTUTZ: Good morning, Your Honor. Paige Amstutz  
14 with Scott, Douglas & McConnico for the plaintiffs. With me  
15 are Andy Bart from Jenner and Block, Rob Gilmore from Stein  
16 Mitchell and our client representative Jared Freedman with the  
17 Recording Industry Association of America.

18 THE COURT: All right. Good morning.

19 MR. RAVEL: Good morning, Judge. I'm Steve Ravel from  
20 Kelly Hart, here in Austin for defendant Grande Communications  
21 Networks. With me from Armstrong and Teasdale is Richard  
22 Brophy, Zach Howenstine and Maggie Szewczyk.

23 THE COURT: Very good. Now, I don't know exactly who  
24 we have on the line.

25 COURTROOM DEPUTY CLERK: Counsel, the mike is unmuted

1 if you'd like to announce yourself online.

2 MR. TRACER: Sure. This is Jacob Tracer from Jenner  
3 and Block on behalf of plaintiff.

4 MR. O'BEIRNE: Good morning, Your Honor. Philip  
5 O'Beirne from Stein Mitchell, also on behalf of plaintiffs.

6 THE COURT: Is that it? Okay. Now, counsel, I think  
7 you know this, but I need to remind you that there's no  
8 recording allowed of the proceedings other than the recording  
9 taken down by our court reporter. You understand that?

10 MR. O'BEIRNE: Yes, Judge.

11 THE COURT: Thank you.

12 MR. TRACER: Yes, of course, Your Honor.

13 THE COURT: All right. Well, believe it or not, I had  
14 a situation when I was presiding over a big case in Chicago  
15 where some paralegal was in the room and she was recording the  
16 whole thing and the lawyer had to call me and apologize and  
17 destroy the recording. So it's good to make sure that we get  
18 that on the record.

19 All right. So first let me get out of the way the  
20 elephant in the room and that's COVID. I understand and I'm  
21 well aware that there are many districts throughout the United  
22 States -- I have friends, a lot of friends on the east coast  
23 and so forth, I was a member of the Judicial Conference and I  
24 was vice president of the Federal Judges Association and so I  
25 had made acquaintance with many, many, many judges in

1 Washington and New York and I know that there are districts  
2 where they have postponed jury trials. We were, of course,  
3 like every other district, on pause for well over a year  
4 actually and that has caused what I like to refer to as a  
5 tsunami of lawyers and cases that are backed up -- you were one  
6 of them -- waiting for a trial and anxious to get a trial.

7 Now, I spoke this morning with Judge Yeakel. Now, the  
8 Western District of Texas operates a little differently than  
9 many districts where I've sat in the past. I've been sitting  
10 here for nine years, so it's like I'm helping out, so it's not  
11 like I'm a guy that just flew in for the trial, although I do  
12 that all the time, but I spoke with Judge Yeakel this morning.  
13 And each division of the Western District of Texas controls its  
14 own procedures with respect to courtroom operations and I think  
15 the Southern District in Houston does the same thing. Now,  
16 that doesn't mean that they don't get together and make a  
17 decision as a district on occasion, they do. But at this  
18 point, the Chief Judge, who is in San Antonio where I am  
19 actually based --

20 Although I do almost as much work here because in San  
21 Antonio, well, you saw my name outside the courtroom. Well,  
22 you didn't. If we were in the first floor ceremonial  
23 courtroom, you would have seen my name outside the courtroom.  
24 I have a chambers and courtroom here.

25 -- has not decided or determined to take the matter to

1 a vote district-wide, so each of the divisions is making their  
2 own choice and that's because this is a huge division. El Paso  
3 is 550 miles away in a different time zone. You have Austin,  
4 San Antonio which are pretty close obviously, but then you're  
5 talking about Del Rio which is way down, heart of the Mexican  
6 border and the situation in these various places is like going  
7 from New York City to the far reaches of Connecticut and  
8 beyond. So we can't really look at this as a homogeneous  
9 situation.

10 In any event, my discussion with Judge Yeakel this  
11 morning is that we are to proceed with jury trial unless I make  
12 a decision otherwise. They are going to be going forward and,  
13 in fact, they're picking a jury now for a trial. So we don't  
14 have a situation where, at least as of right now -- this could  
15 change in a week, you know, you've all lived this, you know  
16 what it's all about. I'm not telling you anything you don't  
17 know. But as of right now, as I sit here, we are scheduled to  
18 begin our trial.

19 Now, I understand and appreciate the fact that you are  
20 concerned, as I should say am I, about the potential that we  
21 could either have a juror or jurors come down with COVID or you  
22 could lose a witness due to COVID and so forth. Now,  
23 unfortunately, the country is being swept like nobody's  
24 business with this omicron variant, but fortunately there is a  
25 silver lining in every dark cloud. It doesn't appear to be as

1 bad symptom-wise, at least for those who are vaccinated, as the  
2 Delta variant was, which means that if you have witnesses that  
3 cannot make it because they've contracted let's say the omicron  
4 variant of COVID, we could have their testimony by video. This  
5 is a civil trial, it's not a criminal trial, you don't have the  
6 same kind of constitutional confrontation issues that you would  
7 have in a criminal case. And in fact, I think you both have  
8 asked that some witnesses be allowed to participate by or give  
9 their testimony by video, so apparently you're not opposed to  
10 that, at least not unilaterally opposed to it. Now, if I grant  
11 your request, and it's a joint request as I understand it, to  
12 postpone the case, here is your problem --

13           You know, counsel, you're such a good-looking guy, I'd  
14 like to see you and the problem is that damn arm is right in  
15 your face from here. All right. I don't know what it is, I  
16 like to look somebody in the eye when I'm talking to them. I  
17 don't like to see an ELMO in your face.

18           We have a problem and that is that we're getting calls  
19 constantly from lawyers like yourselves wanting to get to trial  
20 and they are, many of them, in situations that are as bad as  
21 yours time-wise and some actually even worse. I told you, I  
22 think, or I had relayed to you that I would do everything I  
23 could to get you a firm trial date and I kept my promise. You  
24 do have a firm trial date.

25           Now, there was no way I could have known then what we

1 know now, but here is my problem, because of the length of this  
2 trial and I know that you have suggested between, I don't know,  
3 I think it was like nine days of trial for in one case and then  
4 somebody else said 13 or 14 days of trial, I don't know. Then  
5 we've got one party has 155 exhibits, the other party has 780  
6 exhibits. We've got 14 witnesses and there's a possible 16  
7 other witnesses from the plaintiff. And the defendant has  
8 three, but may call eleven. There's going to be some overlap  
9 obviously. But the problem is that because of the nature of  
10 this case, this is not the first case like this I have presided  
11 over or actually ever been involved in. I was involved in as a  
12 lawyer, many decades ago as that was. Some of these witnesses  
13 can take a long time. We could get a witness on the stand that  
14 could take a day. So this is not a criminal case where we're  
15 talking about somebody getting on the stand and says, yeah, I  
16 saw him pass the drugs, you know, and he's on for two hours or  
17 an hour and a half. There may be some witnesses like that, but  
18 there's others that are going to be on for a very long time, so  
19 I'm looking at this trial taking about three weeks, two to  
20 three weeks, unless I really put some time limits on you. And  
21 you don't want me to do that. I had to try a case where I had  
22 a -- more than one case actually, where I had judges say, well,  
23 you know, you got eleven hours, divide it up any way you want.  
24 And I hated it and I don't do it. I won't let lawyers fool  
25 around and dillydally either and I put a stop to that, but if



1 you're reasonably trying to pursue a point and you're  
2 reasonably trying to get your case tried in a way that makes  
3 you feel comfortable, I'm not going to bother you. Under those  
4 circumstances, even being diligent -- what am I, 36 years on  
5 the bench now? I'm one of the few Ronald Reagan appointees  
6 that's actively on the calendar and I've got a huge calendar.  
7 So the point is I can't just swap you in. You see what I'm  
8 saying? Most of our trials in federal court are a week, so  
9 maybe a little less, then we have the deliberation time.  
10 Sometimes they're a little longer. Then we get -- I mean, I  
11 did a three and a half month trial, I had a weekend break and  
12 then I had another two and a half month trial, so I was in  
13 trial basically six months straight, literally. And that was  
14 bad.

15           So what we need to do is be as careful as we can about  
16 moving this case. Now, the very soonest trial date I could  
17 give you, and I'm talking about the absolute soonest, and even  
18 this is dependent on me being able to get through some other  
19 cases as we have planned because, you know, I'm a huge  
20 basketball fan and I'm a big Baylor fan on top of it and  
21 they're number one right now and it's very aggravating when I  
22 go to ESPN and I turn it on and there's University of Texas  
23 versus, you know, somebody and it's run over and I can't watch  
24 my -- I'm missing the first five minutes of the Baylor game,  
25 and sometimes longer. And that's what I worry about, I worry

1 about us getting a trial that goes long and it runs into this  
2 date. And if it does, I can't just say, well, sorry, sorry  
3 jury, go home.

4 So October 11th and that is me pushing it. If you  
5 don't go on October 11th, you're off until 2023. Now, that  
6 means that you've got to think about this very carefully  
7 because I know that this case has been around a while, it's not  
8 a small case, it's an important case for both sides. I know  
9 the media, not the Austin Statesman, but the media in your area  
10 has been very active in following this case, I mean the  
11 entertainment media, and so they think it's a big case, I  
12 guess. I think that it's certainly something we're willing to  
13 try. And it is a risk on October 11th. I have between now and  
14 October 11th, I'm set solid. It's like one pushes the other  
15 one and the other one pushes the other one and the other one  
16 pushes the other one and by the time you're done, it's like  
17 dominoes falling and I don't want you to be the last domino and  
18 then get kicked off to 2023, which could happen.

19 So counsel, what are your thoughts? And I'm talking  
20 to the plaintiff first. I don't know who is talking for  
21 plaintiff.

22 MR. BART: Thank you. Andrew Bart from Jenner and  
23 Block. First off, thank you for the explanation and the  
24 thoughtful consideration of this issue and obviously it's  
25 something that we thought about a great deal and didn't just

1 reflexively say we want to push this off. We very much want to  
2 try the case and I think -- I'm sure the defendant does as  
3 well. The biggest problem that we face right now is after all  
4 of this break we want the case to be tried in a way where both  
5 sides can make their points as convincingly to the jury as  
6 possible. And we already are aware of witnesses who will not  
7 come for health reasons or, you know, they're elderly, they  
8 have unvaccinated children. There are a million different  
9 reasons right now in addition to just the surge. And while I  
10 share the sentiment and hope that this may be the last surge,  
11 that maybe we'll get past this, that really is what's  
12 motivating the thought, that we'll get here. The spike is  
13 really just hitting us right now and so we could commit to  
14 going forward. And if the numbers continue the way that they  
15 are, not be able to get a jury, get jurors who are sick and  
16 that will almost certainly happen if the numbers continue in  
17 the way that they are. So I think that I owe it to the clients  
18 to give them an opportunity to present their case in an  
19 unbroken way and as effectively to a jury as possible and not  
20 bring in witnesses by remote and not get chopped up and not  
21 take the risk of having to stop midway because of this surge  
22 that is uncertain to us all collectively as anything has been  
23 over the last couple of years. So reluctantly I think we would  
24 take the October 11th date, just so that we would have some  
25 certainty that we're past this because I think what we're

1 looking at over the next three to four weeks is such a volatile  
2 and growing thing. And I think back on the east coast we're a  
3 couple of weeks ahead of everyone else and the infection rates  
4 are just staggering.

5 THE COURT: Oh, yeah. You're in New York, right?

6 MR. BART: Yes.

7 THE COURT: Judge Lamberth and I have been very close  
8 friends for 25 years and he's from San Antonio and he comes  
9 down here, but you know, he's a U.S. District Judge in D.C. and  
10 has been forever, he and I were appointed the same time. He  
11 got out of town in the nick of time. I said, *Well, you went*  
12 *from the frying pan into the fire here.* And he said, *No, no,*  
13 *he said, Believe me, D.C. is worse, much worse than here.*

14 MR. BART: And my colleagues here are from D.C. and  
15 they are experiencing the same thing that we are. And we're  
16 seeing the numbers here follow suit a few weeks behind and I  
17 think the likelihood is that it's going to have an impact,  
18 whether it causes the complete suspension of cases or just  
19 reeks havoc on jury selection being able to maintain a jury for  
20 a couple of weeks trial, which is a real concern as well. So I  
21 think there are a lot of reasons and but for this we very much  
22 appreciated having the fixed date. We would take the  
23 October 11th date.

24 THE COURT: Okay. All right. And by the way, I only  
25 called on counsel -- I want you to know this, because he

1 happened to be sitting right here. It wasn't because I was  
2 calling on a man and not the woman, all right? I want you to  
3 know that. You're looking at a guy who was nominated to be the  
4 woman lawyer of the year.

5 MS. AMSTUTZ: I appreciate it.

6 THE COURT: I'm a big supporter of women in the law.  
7 Yes, sir?

8 MR. BROPHY: Good morning, Your Honor. I share  
9 Mr. Bart's thoughts. We've spoken at length about this with  
10 our client and we share their concerns about trying the case  
11 and trying it properly. I don't think either of us is  
12 interested in having video-based witnesses or anything like  
13 that for a case of this importance.

14 The other point that I would make is I think we can  
15 commit to you, at least for Grande I can commit to you that we  
16 can try our case in five days. My understanding is that  
17 Mr. Bart feels he can do the same.

18 THE COURT: You mean get the whole case tried in five  
19 days?

20 MR. BROPHY: No, no, ten days total.

21 THE COURT: Oh, I see. I was going to say, what  
22 happened?

23 MR. BROPHY: We've got a lot of stipulations to talk  
24 about.

25 THE COURT: That's right. Including stipulating as to

1 liability. Just try it on the damages.

2 MR. BROPHY: So I think if you're willing to be  
3 flexible with us, we very much appreciate that in giving us an  
4 ability to move this until we think we can do it properly, we  
5 can commit to you to getting the case done in ten days in a way  
6 that satisfies our clients, satisfies you.

7 THE COURT: Okay. I'm going to grant your motion.  
8 Obviously I think -- I understand there would be a lot of  
9 federal judges that will say, look, this is your trial date,  
10 you're going, but I don't ever like the idea of somebody  
11 walking out of my courtroom feeling as though -- now, they may  
12 disagree with me. In fact, half the people that walk out of my  
13 courtroom probably always disagree with me, but I want the  
14 lawyers to feel as if they have had their day in court, that  
15 they've been able to try their case.

16 And I am concerned, I'm not as concerned about the  
17 jury because our jury pool is vaccinated, completely  
18 vaccinated. Now, I understand that you can get omicron, but  
19 I'm not worried we're going to make somebody deathly ill here,  
20 that's the point. I am worried we would lose them because  
21 regardless of whether they're vaccinated or not, they come down  
22 with COVID-19, they're off the jury. So that worries me, but  
23 what is my greatest concern here -- because we can socially  
24 distance the heck out of them because it's a civil trial and  
25 we're going to have eight jurors, it's not a 12-person jury

1 here, so we have plenty of room to socially distance them and  
2 we have plenty of room to socially distance them in terms of  
3 their deliberations and their contacts together. So I'm not so  
4 worried. I've had jury trials during COVID before in San  
5 Antonio and I think here. But what I'm worried about is  
6 omicron is so bad right now, I mean we're getting a million  
7 cases a day, over a million cases a day in the United States.  
8 I was watching the news this morning as I was getting ready to  
9 come in and they had somebody from the CDC say that many  
10 hospitals, particularly hospitals on the east coast where many  
11 of our witnesses are coming from have the largest number of  
12 people in hospital with COVID than they ever had from the  
13 entire pandemic, which surprises me because it's supposed to be  
14 milder. I'm not going to get into that and argue about that.  
15 But I'm worried about you not getting your witnesses here.  
16 You've got some expert witnesses and your expert witnesses not  
17 being able to make it because they're down with COVID and then  
18 what do we do? We've got a jury sitting here and we can't get  
19 your expert and we don't know how your expert is going to be.  
20 Are they going to be in a situation where they're even going to  
21 be able to testify by video? I mean, if they're in the  
22 hospital, obviously not. So I think the risk of you not  
23 getting a thoroughly fair trial is enough. And that concerns  
24 me.

25 I just finished a patent case not long ago, a few

1 months ago, a pretty big patent case actually in San Antonio.  
2 Believe it or not, it's not just the judge in Waco that tries  
3 patent cases. I know that's what it seems like, but Judge  
4 Albright isn't the only one that tries patent cases. I  
5 actually do try patent cases. My colleagues have a tendency to  
6 give me these complex cases because I have a reputation of  
7 doing these complex cases and they never appeal. It's a pretty  
8 big verdict, no appeal. So I think they felt like they got a  
9 fair trial. They probably weren't happy with the verdict and  
10 I'm sure neither side was a hundred percent happy with my  
11 rulings, you know, in every instance, but that's not my job.  
12 My job is to try to make the right ruling. You don't want a  
13 judge who does this which way is the wind blowing.

14 Now, let me also be candid with you. I know you have  
15 given me your agreement as to how much time you're going to get  
16 for this and how much time you're going to get for that. These  
17 are decisions that I make, not the attorneys. And I may fully  
18 agree with you and I may not. I want to see a little bit more  
19 before I make those decisions, so I'm going to defer making any  
20 type of commitment on those issues. Let's see if there's  
21 anything else that I can --

22 (Pause.)

23 Okay. We've got a bunch of motions in limine.

24 LAW CLERK: You ruled on those.

25 THE COURT: Oh, that's right, I did. I ruled on all



1 those motions in limine, so those are out of the way. Do we  
2 have anything else that -- how long ago was that that I ruled  
3 on those? A while ago, right?

4 MR. BART: Year and a half ago.

5 THE COURT: A year and a half ago? No wonder I didn't  
6 remember. I have a hard time remembering where I parked my car  
7 when I go into the grocery store.

8 Do we have anything else that we should discuss that  
9 would be important to talk about now given the fact that we've  
10 got the October 11th date?

11 MR. BART: I don't think so, Your Honor. There are  
12 certainly issues that we need to have resolved before trial.  
13 Some of them have just come up within the last week or two as  
14 we've been preparing for this conference and we've been working  
15 collaboratively with defendant's counsel to try and focus those  
16 issues and also to reduce the scope of witnesses and exhibits  
17 and I think we will continue to do that. Mr. Brophy may have a  
18 different view on whether there's anything else we should  
19 cover.

20 MR. BROPHY: No, I agree. I think given the  
21 October 11th date, there's time for us to continue to work  
22 together which we've been doing quite well to try to narrow  
23 those issues for Your Honor.

24 THE COURT: Thank you. Thank you very much. You can  
25 be seated. You know, it may surprise you, but I'm actually

1 looking forward to this trial. There's nothing better for a  
2 trial judge who came from a civil trial background -- I used to  
3 represent banks and savings and loans and I was involved deeply  
4 in the savings and loan crisis and the -- remember the Keating  
5 Five and all that? Then to have good lawyers from good firms,  
6 well prepared to try a case. I mean that is the best. I can't  
7 tell you how often that doesn't happen. And I was talking with  
8 Judge Pitman, about a month ago we were talking about trials  
9 and he says, *Don't you just sometimes want to jump off the*  
10 *bench and grab the microphone and say Just ask it this way.*  
11 And I said, *Yes, yes!* But I don't think I'm going to have that  
12 problem in this case at all.

13 Okay. Very good. Then that's what we'll do. I want  
14 to again caution you that I have given you a trial date, I am  
15 not going to call it a firm trial date. I'm going to call it a  
16 set trial date, which means that I don't want you throwing  
17 rocks at me if you get a call from my courtroom deputy,  
18 Ms. Springs, telling you that your trial has been bumped for  
19 three weeks or whatever because Judge Ezra is still in trial in  
20 another case. We're going to have the ESPN problem here.

21 Okay. I can't think of anything else we need to cover  
22 and I just have a tendency to drone on and on, so I don't think  
23 you want me to do that. I do thank you for coming. I know it  
24 was a long flight. You're probably saying to yourself, *Why did*  
25 *I come all this way for him to just tell me he's going to grant*

1 *the motion?* Well, because I wasn't sure I was going to grant  
2 the motion when I walked in the door. I wanted to hear from  
3 you, I wanted to determine for myself how sincere I thought you  
4 really were, whether this was just it's more convenient to do  
5 it then, you know. And we have turned down counsel who have  
6 asked for COVID extensions when there wasn't the kind of  
7 compelling reasons which you have cited here. You know, you  
8 really do have a lot of witnesses who are going to be coming in  
9 from out of town and who will probably say I'm not coming in  
10 from out of town. And you know, you have no way to compel them  
11 to do that. This isn't a criminal case, I can't issue a  
12 subpoena and compel them. You know, my old buddy Judge Kelly  
13 in New York, I used to have him issue my subpoenas for me. But  
14 I think he's -- didn't he retire? Yeah.

15           Okay. That being that, we will issue a civil order  
16 today, a bench order continuing your trial, granting the joint  
17 motion to continue, resetting the trial for October 11th. I  
18 don't know which courtroom we will be in, but we may well be  
19 in --

20           COURTROOM DEPUTY CLERK: By October I would think  
21 you'd be back downstairs.

22           THE COURT: Maybe not. We'll see. We've got to -- we  
23 have some shuffling going on here, so we'll find a courtroom.  
24 When you come we'll get you to the right spot, all right? The  
25 worst thing you've got to worry about is the judge who can't

1 find his courtroom or her courtroom, not the lawyers.

2           Okay. Thank you so very much for coming. It was  
3 important that I talk to you, it was important that I listen to  
4 you and I wanted you to hear from me personally what the  
5 ramifications were and I wanted an answer from you as to  
6 whether you wanted to take that risk. Okay. And that was  
7 important. I don't like to do that over the telephone. Okay,  
8 thanks very much. Have a safe trip back.

9           (9:41 a.m.)

10                           \*   \*   \*

\* \* \* \* \*

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: August 15, 2022

/s/ Angela M. Hailey

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